IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.319 OF 1991

1. Namdeo Karbhari Bodake, 56 yrs. Occ. Agriculturist.

2. Chindu Karbhari Bodake, 40 yrs. Occ. Agriculturist.

3. Pandhurang Karbhari Bodake, 30 yrs. Occ. Agriculturist.

4. Soyabai Mahadu Ghuge, 71 yrs. Occ. Household.

All residing at Moh, Tal. Sinnar Dist. Nashik. .. Appellants
(Org. Defts.)

Vs.

1. Chababu @ Chahadu Rangnath Bhise, 45 yrs., Occ. Agriculturist.

2. Punja Rangnath Bhise, 46 yrs. Occ. Agriculturist.

3. Balu Rangnath Bhise, 41 yrs. Occ. Agriculturist.

4. Smt. Avadabai Rangnath Bhise 73 yrs., Occ. Household

All residing at Moh, Tal.Sinnar Dist. Nashik. .. Respondents
(Org. Plffs.)

Mr. Vinod Jadhav h/f Mr. M.V. Sali for the appellants.

Mr. Girish R. Agrawal h/f Mr. R.M. Agrawal for the respondents.

CORAM: B.H. MARLAPALLE, J.

Date : December 20 & 21, 2005.

ORAL JUDGMENT:

1. This appeal arises from the decree passed by the Lower Appellate Court in Regular Civil Appeal No.90 of 1982. Regular Civil Suit No.171 of 1971 filed by the present respondents was dismissed by the learned Civil Judge, Junior Division at Sinnar on 8/2/1982 and the Lower Appellate Court by the impugned decree dated 26/4/1991 has been pleased to decree the Civil Suit by holding that the appellants-defendants are encroachers on the land admeasuring 99 Ares in Gat No.281 owned by the plaintiffs and further directed to deliver actual, vacant and peaceful possession of the said encroached portion shown in blue colour in the map at Exh.44 prepared by the D.I.L.R. While admitting this appeal issues no.2,3 and 5 have been noted as the substantial questions of law and the substantial questions of law requiring consideration in this appeal are as under :-

(a) Whether the suit filed by the plaintiffs was barred by limitation?

(b) Whether the defendants had perfected their title as owners by adverse possession in respect of the encroached portion of the suit land i.e. 99 Ares from Gat No.281 of village Moh in Taluka Sinnar of Nasik District?

2. As per the plaintiff original defendant Karbhari Pandu Bodake had encroached upon his agricultural land admeasuring 14 Acres 17 Gunthas located in Gat No.281 (Survey No.84/1) of village Moh to the extend of 99 Ares and this encroached land was merged with the defendants' land in Gat No.304 (Survey No.82/2). He, therefore, applied to the Surveyor and got surveyed report made in June 1971 and it was indicated in the said report that the defendant had, in fact, encroached upon the plaintiff's land. The plaintiff examined the Surveyor Shri Tukaram Shimaji Deshmukh (P.W.1), in addition to himself as P.W.2. Shri Shivram Dadu Pawar an employee from the Soil

Conservation Department of the State Government was examined as P.W.3 and Dagdu Bhise a neighbouring land holder was examined as P.W.4. Whereas Defendant No.1B was examined as D.W.1 and Dhondu Valu was examined as D.W.2. On assessment of the oral and documentary evidence and more particularly the Surveyor's report along with the map at Exh.44, the Trial Court recorded a finding that the suit encroached land was owned by the plaintiff and it was necessary for him to have taken action against the defendant immediately by approaching the police station and the encroachment which was there for more than 18 years had created ownership right of the defendant in respect of the suit land by virtue of the principle of adverse possession. This finding regarding encroachment was not challenged by the defendants by filing an appeal/cross-appeal before the Lower Appellate Court, whereas the finding regarding the ownership by adverse possession came to be challenged by the plaintiff in Regular Civil Suit No.90 of 1982, in which the defendants raised the issue of limitation and prayed that Regular Civil Suit No.171 of 1971 was required to be dismissed as it was hit by the law of limitation. The learned Joint District Judge at Nasik, therefore,

framed the following two issues and answered both of them in favour of the plaintiffs and against the defendants:-

(i) Whether the plaintiff's suit is barred by limitation?

(ii) Whether defendant has proved that he has become the owner of suit land by principal of adverse possession?

3. The Lower Appellate Court, on assessment of the evidence adduced before the trial court, relied upon the following two decisions of this Court while allowing the appeal:-

(a) Yesu Sadhu Nimagre and ors. vs. Kundalika Babaji Nimagre and anr. reported in **1977 Mh.L.J. 130**.

(b) Rajaram Soma Mali and anr. vs. Kautik Motiram Deshmukh and ors. reported in **1977 Mh.L.J. 485**.

4. The learned Counsel for the defendants urged that the Lower Appellate Court committed manifest

errors in law by reversing the decision of the trial court on the point of ownership by adverse possession and in any case the plaintiff's suit was required to be dismissed as time barred, more so when it was admitted by the plaintiff that the alleged encroachment was for more than 18 years.

5. The Lower Appellate Court referred to the Writ Statement filed by the defendant at Exh.11 and noted that the defendant had not specifically pleaded as to when his possession over the suit land became adverse and as to when the starting point of limitation commenced. The Lower Appellate Court also did not record any findings in this regard but only observed that the defendant is in possession of encroached portion for more than 12 years and naturally he had, by virtue of the principle of adverse possession, become the owner of the suit land and dismissed the suit. There was no further discussion as to how the principle of adverse possession was applicable in support of the claim made by the defendant. A Division Bench of this court in the case of Swamirao vs. Bhimabhai AIR 1921 Bom. 368, while considering the scheme of Section 28 of the Indian Limitation Act,

1908 (which is pari materia with section 27 of the Indian Limitation of 1963) held as under:-

> ".....An owner of property does not lose his right to property merely because he happens not to be in possession of it for twelve years. His right under under section 28 is only extinguished at the determination of the period limited by the Act to him for instituting a suit for possession of the property. It must be, therefore, that the period cannot be determined unless it has commenced to run, and the period will not commence to run until the owner is aware that some one else in possession is holding adversely to himself....."

6. In the case of Rajaram Mali (Supra), this Court referred to the decision in S.M. Karim vs. Bibi Sakina **(AIR 1964 SC 1254)** and observed as under:-

> "If regard be had to Article 65 of the Limitation Act of 1963 it is clear from the wordings thereof that the defendants' possession of the suit land by itself is not decisive. It may or may not be adverse and it is always a question of fact whether the possession of the defendants is adverse or not and from what date if at all it can be said to be adverse. It is not as if there is a deeming provision in the law that when there is an invalid sale or an invalid exchange, the possession of the person taking possession pursuant to such a transaction shall be deemed to be adverse to the other party. The nature of possession is a question fact and unless adverse possession is pleaded it cannot be presumed."

6A. The learned counsel for the plaintiff has also relied upon the decision in the case of S.M. Karim (Supra) and the decisions in the case of Roop Singh (Dead) through L.Rs. vs. Ram Singh (Dead) through L.Rs. **[AIR 2000 SC 1485]**, D.N. Venkatarayappa and anr. vs. State of Karnataka and ors. **[(1997) 7 SCC 567]**, as well as the decision of this court in the case of Bhimrao Dnyanoba Patil and Ors. vs. State of Maharashtra and Ors. **[2003(3) Bom.C.R. 150]**. This court in Bhimrao's case (Supra) referred to the decisions in the case of Karim (Supra), P. Lakshmi Reddy vs. L. Lakshmi Reddy **[AIR 1957 SC 314]** and Sheodhari Rai vs. Suraj Prasad Singh **[AIR 1954 SC 758]** and held as under:-

> ". The essential ingredients of adverse possession are actual and continuous possession alongwith necessary animus on the part of the person intending to perfect his title to the property by adverse possession. The possession of the property with the bona fide belief that the same belongs to him would disclose absence of necessary animus for perfecting the title by adverse possession in relation to such property. Unless the enjoyment of the property is accompanied by adverse animus, mere possession for a long period, even over a statutory period, would not be sufficient to mature the title to the property by adverse possession. Certainly,

> these essential ingredients of adverse possession are to be established by the person claiming acquisition of title to a property by adverse possession.....
> there must be open and explicit disavowal and disclaimer brought to the knowledge of the owner. Mere possession for however length of time does not result in converting the permissive possession into adverse possession. The permissive possession has necessarily to prove some overt act on his part indicating assertion of hostile title. It is well said that permissive possession and hostile animus operate in conceptually different fields, and the permissive possession does not become adverse by a mere change in the mental attitude of the person in possession and it is for such person to prove from which date the permissive possession became hostile."

. In the case of D.N. Venkatarayappa (Supra) the following principles have been reiterated by the Apex Court in regard to the plea of ownership by adverse possession:-

(a) The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.

(b) Apart from the actual and continuous possession which are among other ingredients of adverse possession, there should be necessary

animus on the part of the person who intends to perfect his title by adverse possession.

(c) One of the important ingredients to claim adverse possession is that the person who claims adverse possession must have set up title hostile to the tile of the true owner.

7. The Lower Appellate Court in the instant case noted that there was a Nala running across South North adjoining the agricultural land of the plaintiff and the defendant and there was an old Bandh to the North side of Gat No.304 belonging to the defendant since about 50 years or so and there is another Nala existing for more than 20 years between the two Bandhs. From these pleadings the Lower Appellate Court noted that the defendants had not pleaded specifically as to when their possession over the suit land became adverse and as to when the starting point of limitation commenced. Under Article 65 of the Limitation Act 1963 the period of limitation would start to run when the possession of the suit property by the defendants became adverse to the plaintiffs and

the defendants did not state and prove as to when their possession became adverse or hostile to the plaintiffs' title. The evidence of P.W.3 Shivram Pawar indicated that the defendant had engaged the bulldozer and tractor in the months of May and June 1971 and this supported the claim of the plaintiff that the original defendant had ploughed the Bandh's land in the year 1971. In addition, the Surveyor's report which was based on the measurements carried out in the presence of the parties also proved the factum of encroachment to the extent of 99 Ares by the defendants over the land of the plaintiffs. It is thus clear that the findings recorded by the Lower Appellate Court that the defendants failed to prove in law their claim of ownership by adverse possession as the necessary ingredients in support of such a claim could not be established either by the pleadings or by the evidence adduced before the trial court are required to be upheld and there was no material in support of the findings recorded by the trial court on this issue. The Lower Appellate Court was, therefore, justified in reversing the findings of the trial court. The view taken by the Lower Appellate Court does not suffer from any infirmities in law and it

rightly stepped in to correct the manifest error committed by the trial court in dismissing the suit by accepting the defendant's claim of ownership by adverse possession. On the issue of limitation, both the courts below have recorded a concurrent finding. The learned counsel for the defendants urged that when admittedly the encroachment was prior to 18 years or so, there was no reason for the trial court to entertain the suit. As noted earlier, the plea of limitation, in the instant case, would commence when the defendants put up the claim of their title adverse to the title of the original owner and this plea was taken up by the defendants after the plaintiffs asked for the return of the encroached land based on the Surveyor's report.

8. In the premises, this second appeal fails and the same is hereby dismissed with costs.

(B.H. Marlapalle,J.)